No. 14,871

IN THE

United States Court of Appeals

For the Ninth Circuit

EDGAR RICHARD LEWIS,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

Upon Appeal from the District Court for the District of Alaska, Third Division.

BRIEF FOR APPELLEE.

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Subject Index

Table of Authorities Cited

Cases

Statutes

Rules

Texts

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BRIEF FOR APPELLEE.

JURISDICTIONAL STATEMENT.

Appellant was convicted after a jury trial in the District Court for the District of Alaska, Third Judicial Division, at Anchorage, Alaska, the Honorable George W. Folta presiding, of two counts of the violation of the Alaska Uniform Narcotic Drug Act and two counts of the Federal Harrison Narcotic Act.

The Court sentenced the appellant to serve consecutive terms of imprisonment, totalling seventeen years. The appellant moved to vacate the sentences imposed upon him by the District Court, but his

petition has been denied. It is from the order denying his petition that the appellant now appeals.

Jurisdiction below was conferred by 28 U.S.C. 2255. Jurisdiction in this Court is also conferred by 28 U.S.C. 2255.

STATEMENT OF FACTS.

The appellant was found guilty by a District Court jury on January 26, 1953, on four counts involving violations of the narcotic laws. The events leading up to the appellant's conviction, as reported in his brief under the caption "Case History", are not altogether correct.

The files of the District Court will reveal the appellant was indicted in three cases which were consolidated for the trial. Those criminal cases have been designated as District Court Nos. 2551, 2555, and 2575.

The indictment in No. 2551 charged the appellant, Edgar Richard Lewis, and his reputed wife, Nancy May Lewis, with a violation of the Uniform Narcotic Drug Act of the Territory of Alaska; specifically, Section 40-3-2 ACLA 1949, of that Act, in that Edgar Richard Lewis and Nancy May Lewis, did on or about the seventh day of April, 1951, have in their possession a quantity of heroin and cannibus plant. This indictment was filed on October 29, 1951, by the Grand Jury in the District Court for the Third Division, Territory of Alaska. At the same time, the indictment in Criminal No. 2555 was filed and it charged Edgar Richard Lewis with having on the

twenty-sixth day of May, 1951, possession of heroin, in violation of the Uniform Narcotic Drug Act. Upon return of these indictments, the District Court set time of arraignment for Wednesday, October 31, 1951 at 10:00 A.M. On that date, Edgar Richard Lewis and Nancy May Lewis failed to appear and on the motion of the United States Attorney, the bail was forfeited and bench warrants issued by District Judge Anthony Dimond.

The proceedings in connection with the forfeiture of bail eventually reached this Court as the case of *Swanson v. United States,* 224 F. 2d 795, CA 9, No. 14231. On November 2, 1951, the Grand Jury returned a two count indictment in Criminal No. 2575, charging Edgar Richard Lewis and Nancy May Lewis with two counts of violations of the Federal Narcotic Act, commonly referred to as the Harrison Act. Edgar Richard Lewis and Nancy May Lewis were still fugitives and additional bench warrants were issued the same day that this new indictment was filed.

Nancy May Lewis was apprehended in New York City on June 6, 1952, and from there returned to Alaska. On August 11, 1952, she pleaded guilty to the two counts of the indictment in No. 2575. She also pleaded guilty at the same time to the indictment in No. 2551, and was sentenced to be imprisoned to a term of three years on each charge; all of the sentences were to run concurrently. Thorough examination of the files reveals no further additional entries in connection with Nancy May Lewis.

Edgar Richard Lewis was taken into custody at Chicago, Illinois, September 29, 1952, on the bench warrant issued in Criminal No. 2551. Removal proceedings caused the return of Lewis to the District of Alaska for his trial.

On January 7, 1953, on motion of the United States Attorney, Nos. 2551, 2555, and 2575 were joined together for trial and the trial was set for 10:00 A.M. January 23, 1953. Verne Martin, an Anchorage attorney, was appointed by the Court on January 7, 1953 as counsel for Lewis. The cases came on for trial on January 23, 1953, and at that time the District Court entered an order designating the indictments in numerical order for the purposes of trial. The Court designated the indictment in Criminal No. 2551 as Count I, the indictment in Criminal No. 2555 was designated as Count II, and the two count indictment in Criminal No. 2575 was designated as Counts III and IV.

The trial was completed on January 26, the case went to the jury, and the jury returned its verdict on the same day. Lewis was found guilty as charged of all four counts. On January 27, the District Court imposed sentences of four years on Count I, five years on Count II, four years on Count III, and four years on Count IV, the sentences to run consecutively for a total of seventeen years. Judgment incorporating the sentences of the District Court was entered on January 28, and on the same date the defendant filed a motion for a new trial. On February 11, the motion for a new trial was denied, and on February 18,

notice of appeal was filed. Examination of the files does not add further information in connection with the appeal of the defendant from his conviction, and it is assumed that he failed to pursue an appeal any farther.

On June 26, 1954, appellant sought to invoke the jurisdiction of the District Court under 28 U.S.C. 2255 and moved to vacate the judgment and sentence of Counts III and IV, alleging that the offense charged in those counts was the same offense as charged in Count I. On June 30, 1954, the District Court entered an order denying appellant's petition on the grounds that it appeared on the face of the motion that the petitioner was not entitled to relief. The appellant then lodged a notice of appeal with the District Court on July 22, 1954, from the denial by the District Court in granting the petition for correction of sentence under 28 U.S.C. 2255. At that time appellant also filed an affidavit *in forma pauperis.* On September 16, 1954, he filed a notice demanding the record on appeal be prepared and filed, and a new petition *in forma pauperis.* The file includes a minute order dated May 18, 1955, denying a motion to vacate the judgment and sentence.

On June 6, 1955, Edgar Richard Lewis again petitioned the District Court for a hearing under the provisions of 28 U.S.C. 2255. Before the District Court could rule on this new petition, the Court of Appeals (9), on June 9, 1955, Denman, Chief Judge, and Circuit Judges Bone and Orr in Misc. No. 452, denied appellant's petition for review of the order

of the District Court, denying his first motion to vacate the judgment and sentence. On June 17, 1955 the District Court entered an order denying the appellant's application of June 6, 1955 for a hearing. Finally, on August 18, 1955, the Court of Appeals vacated its order of June 9, and the proceedings are now finally before the Court.

ISSUES PRESENTED.

I.

A Court of appellate jurisdiction will not review mere errors of law occurring in the trial which might have been raised by way of direct appeal from a judgment of conviction.

II.

A Court of appellate jurisdiction will vacate a sentence imposed if the trial Court was without jurisdiction to impose such sentence, or if the said sentence is otherwise subject to collateral attack.

ARGUMENT.

I.

A COURT OF APPELLATE JURISDICTION WILL NOT REVIEW MERE ERRORS OF LAW OCCURRING IN THE TRIAL WHICH MIGHT HAVE BEEN RAISED BY WAY OF DIRECT APPEAL FROM A JUDGMENT OF CONVICTION.

Appellant has, under the caption "Questions for the Court to Consider", listed some fourteen questions.

Not all these questions should properly be considered in this appeal. In considering a proceedings brought under 28 U.S.C. 2255, it has generally been held that the appellate Court will not consider mere errors of law occurring during the trial of the case; that is, the so-called 2255 proceedings does not give a prisoner adjudged guilty of a crime the right to try over again on appeal the identical questions presented during trial.

Under a 2255 proceedings, the issues are limited generally to those instances where a sentence is void or otherwise subject to collateral attack. This general rule is subject to the one possible qualification that if a prisoner is held in custody and the trial in which he has been convicted was conducted in such a manner as to be a sham or a farce, then the appellate Court may review a conviction obtained under such circumstances.

The brief of the appellant discloses that he advances a number of objections to support his contention that he is wrongfully held in custody. The issues raised fall into two distinct classes or groups. He directs his attack to the manner in which his trial was conducted, and then he questions the validity of the indictments on which he was tried.

Turning to the allegations that first appear in appellant's argument, he contends that his arrest was illegal in that the officer arrested him improperly. The answer to this, of course, is that it has been held that a motion for vacation of a sentence under 28 U.S.C. 2255 cannot be used in lieu of an appeal to correct

errors committed during the course of trial, even though such errors relate to constitutional rights.

(*Davis v. United States,* (CA 7) 214 F. 2d 594, 596;

Adams v. United States ex rel. McCann, 317 U.S. 269, 274;

Crawford v. United States, (CA 6) 219 F. 2d 478;

United States v. Rutkin, (CA 3) 212 F. 2d 641, 642;

Bozell v. Welch, (CA 4) 203 F. 2d 711, 712;

Klein v. United States, (CA 7) 204 F. 2d 513, 514;

United States v. Rosenberg, (CA 2) 200 F. 2d 666, 668.)

These cases may be distinguished from *Price v. Johnson,* 334 U.S. 267, where certiorari was granted to the Ninth Circuit. Habeas corpus will be granted where a question of due process is raised, and in *Price v. Johnson* it was held that the District Court should have heard the petitioner's allegations that the Government had obtained perjured testimony in securing conviction.

Continuing at page 8 of his brief, appellant argues that the Government has failed in the trial to prove continuity of possession of certain physical objects offered into evidence. This particular allegation evidently concerns the offering into evidence of a narcotic drug as an exhibit. Whether such physical objects were or were not properly admitted in evidence

probably would again be a matter properly raised by way of a direct appeal from the conviction.

Appellant next raises a question of the sufficiency of the evidence introduced at his trial and contends that the Government suffered a complete failure of proof to convict him. The answer to this is that the weight and substance of the evidence is within the province of the trial judge and the trial jury and again a question which properly should be raised on appeal from the conviction.

Appellant alleges that the former United States Attorney acted improperly in that he made derogatory remarks about the character of the appellant during the argument to the jury. Again, it has been held that such an allegation will not be considered in a proceedings to vacate a sentence.

(*Pelley v. United States,* 214 F. 2d 597.)

On page nine of his brief, the appellant alleges that the testimony of an expert witness was received by the Court, contrary to "Rule 28, Section 464, FCC". The trial Court has authority conferred upon it to appoint an expert witness when needed in the discretion of the Court. The appellant has in mind, of course, Rule 28 of the Federal Rules of Criminal Procedure, but the allegation on its face indicates that the appellant here misunderstands the rule. Rule 28 does not restrict the right of a party to call an expert witness of its own selection.

(Vol. 4, *Barron and Holtzoff,* Section 2213, page 229.)

Appellant is confused, apparently, in the circumstances under which the narcotics agent testified at the trial.

II.

A COURT OF APPELLATE JURISDICTION WILL VACATE A SENTENCE IMPOSED IF THE TRIAL COURT WAS WITHOUT JURISDICTION TO IMPOSE SUCH SENTENCE, OR IF THE SAID SENTENCE IS OTHERWISE SUBJECT TO COLLATERAL ATTACK.

The second group of allegations made by the appellant follow in chronological order and begin at page 10 of his brief. These allegations are directed toward the indictments on which appellant was tried and convicted.

He alleges that the indictments are duplicitous and that several crimes are charged in the same indictment. In examining the argument of the appellant further, however, it appears that what he, in fact, now objects to was trial together of the several indictments found against him. Authorization for joinder of indictments for trial is found under the Federal Rules of Criminal Procedure, Rule No. 13. It is clear that under this rule the trial Court has the discretion to order trial together of indictments which might have been joined in the same indictment under Rule 8, Federal Rules of Criminal Procedure. Relief for prejudicial joinder is provided for by Rule 14, Federal Rules of Criminal Procedure. The record does not show any effort on behalf of appellant to obtain a separate trial in District Court.

More substantially, however, is the appellant's complaint that he has been charged with the same offense under both the Territorial Statute (40-3-2 ACLA 1949) and the Federal laws (26 U.S.C. 2553 and 26 U.S.C. 2593). The indictment in Criminal No. 2551 designated as Count I, is similar to the two counts of the indictment in Criminal No. 2575. Specifically, the date of the offense is identical in both indictments, the parties named as defendants are identical, and the possession of the same type of narcotic drugs is alleged. From these circumstances, it appears certain that the same transaction has been relied upon as the basis for these two indictments. It is not clear on what theory the Government proceeded at the time the indictments were drawn, but examination of the statutes involved and the somewhat limited authority available, leads to the conclusion that charging the offense in this manner was error. The Uniform Narcotic Drug Act of the Territory of Alaska, Section 40-3-21 ACLA 1949, provides that no prosecution may be had under the Alaskan Act if such person has been convicted or acquitted under the Federal laws of the same act or omission. The specific statute is set out as follows:

4-3-21

Effect of Acquittal or Conviction
Under Federal Narcotic Laws

> "No person shall be prosecuted for a violation of any provision of this Act if such person has been acquitted or convicted under the Federal Narcotic Laws of the same act or omission, which, it is alleged, constitutes a violation of this Act."

It might be argued that this prohibition might not apply when the same offense is charged under the Alaskan Act and under Federal Narcotic Laws concurrently. It is not the intention, however, of the Government to rely on an argument of doubtful merit and which is plainly contrary to the meaning of 40-3-21. This particular provision (40-3-21) has not been construed by the Courts in the Territory of Alaska, but an identical Act is found in the laws of the State of Arizona. The Supreme Court of Arizona has held that an acquittal of the possession of drugs under the Harrison Narcotic Act is a bar to prosecution for possession of the same drugs under the State Act. The Arizona decision is believed to be correct.

(*United States v. Worton,* 160 Pac. 2d 352.)

The Government's position then assumes that the two count indictment in Criminal No. 2575 charges an offense and that conviction under these counts is within the prohibition of 40-3-21 ACLA 1949. The sentence imposed on appellant in Count I should be vacated.

Criminal No. 2555, designated as Count II for trial, charges a violation of the Alaska Uniform Narcotic Drug Act. A reading of the indictment leaves no doubt that the offense charged under this indictment stems from a distinct and separate transaction than the transaction upon which the indictments in the other three counts are founded. The form of the indictment itself, while not in good pleading, is believed sufficient in that it charges an offense, and, therefore, the validity of this judgment and sentence

should be sustained. Finally, the two count indictment in Criminal No. 2575, designated for the purposes of trial as Counts III and IV, is clearly in bad form, but the indictments do appear to charge an offense and should be sustained. Similar indictments have been before this Court and have been upheld.

(*Barker v. United States,* (CA 9) 6 F. 2d 419, certiorari denied, 269 U.S. 579;

Ching Wan v. United States, (CA 9) 35 F. 2d 666;

Ballestrero v. United States, (CA 9) 5 F. 2d 503.)

Assuming that Count I is set aside, then the sentences imposed under Counts II, III, and IV should advance. Therefore, the sentence imposed under Count II should date from the 27th day of January, 1953, in accordance with the rule set forth in *Blitz v. United States,* 153 U.S. 308. Also, *United States v. Tufanelli,* 138 F. 2d 981.

CONCLUSION.

We summarize the Government's argument in this fashion.

All of appellant's allegations, with the exception of those allegations directed to the validity of the indictments on which he was tried and convicted, are matters which properly should have been raised on direct appeal of his conviction and should not be considered on appeal from a denial of the District Court to vacate the sentences pursuant to 28 U.S.C. 2255.

Review of the indictments on which the appellant was tried and convicted indicate that the indictment in Criminal No. 2551 charges the same offense as the two counts of the indictment in Criminal No. 2575. Further, that the Uniform Narcotic Drug Act for the Territory of Alaska, ACLA 40-3-21, prohibits prosecution of the same offense if brought under Federal Harrison Law. If the two count indictment in Criminal No. 2575 is sufficient to charge an offense, the sentences imposed on this indictment should not be vacated and set aside. It is urged that the indictments in both Criminal No. 2555 and Criminal No. 2575 charge an offense and should be sustained.

In conclusion, this Court should remand the case to the District Court with instructions to vacate and set aside the sentence imposed in Count I. Counts II, III, and IV should not be affected thereby except to the extent that they will advance as to their effective dates, following the rule announced in *Blitz v. United States,* 153 U.S. 308, and *United States v. Tufanelli,* 138 F. 2d 981.

Dated, Anchorage, Alaska,
November 10, 1955.

Respectfully submitted,

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